In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1193

WILLIAM THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 12a) dismissing the appeal is not reported.

JURISDICTION

The order of the court of appeals was entered on February 18, 1969. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to March 26, 1969, and on March 24, 1969, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner may challenge the government's pre-trial dismissal of the indictment against him, with

leave of court, while his motion for suppression and/or return of allegedly illegally seized property was pending.

STATUTE AND RULES INVOLVED

28 U.S.C. 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Rule 41, F.R. Crim. P., provides in pertinent part:

* * * * *

> **(e) Motion for Return of Property and To Suppress Evidence.**
>
> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admis-

> sible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.
>
> * * * * *

Rule 48(a), F.R. Crim. P., provides:

> The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

STATEMENT

On November 16, 1966, an indictment was returned in the United States District Court for the Northern District of Ohio, charging petitioner with illegally acquiring and then transferring marihuana, in violation of 26 U.S.C. 4744(a) and 4742(a) (Pet. App. 3a–4a). On February 12, 1968, petitioner moved under Rule 41(e), F.R. Crim. P., to suppress as evidence and to return property seized at the time of his arrest. He alleged that the sworn complaint underlying the arrest warrant did not adequately establish probable cause; that information leading to the arrest was itself the product of an illegal search of his automobile by state officers; and that execution of the arrest warrant had been illegally delayed in order to enable officers to search certain premises (Pet. App. 4a–6a). Petitioner also made a motion to dismiss for lack of a speedy trial.

Three days before the filing of his motion under Rule 41(e), petitioner had been convicted (on February 9, 1968) in a state court for possessing marihuana for the purpose of sale. This state indictment had been returned on May 12, 1966, some six months before the federal indictment; it, like the indictment in this case, alleged possession of marihuana on April 21, 1966. Thereafter, on April 3, 1968, with leave of court pursuant to Rule 48(a), F.R. Crim. P., the United States attorney dismissed the federal indictment (Pet. App. 9a).

Several days later, petitioner moved to vacate the dismissal, alleging that the property seized at the time of his arrest had been turned over to state authorities and had been the subject of the state prosecution (Pet. App. 10a). It was further alleged (*ibid.*):

> 3. That based on the Defendant's possession of this property which was discovered and seized incident to the execution of the warrant in this case, the Defendant has been convicted in the state court and is awaiting sentence pending a determination, by this Court, as to the validity of the warrant herein, and the resolution of the Government's case.
>
> 4. That at the state trial, in which the jury was waived, the decision as to the validity of the warrant was reserved for this Court to make, because the warrant that furnished the basis for the seizure was a federal warrant, and the issue as to its validity not only entailed a consideration of the warrant as written by this issue, to be properly determined involved a consideration of facts showing an illegal

search and seizure in Illinois of contraband that had been sent through the mails.

Petitioner contended that dismissal of the federal indictment would "perpetuate a state conviction based on an illegal federal warrant" (Pet. App. 11a). The district court denied the motion (Pet. App. 11a). The government responded to petitioner's appeal by moving to dismiss it on the ground that a *nolle prosequi* before trial under Rule 48(a) is not an appealable "final decision" under 28 U.S.C. 1291. The court of appeals dismissed the appeal as frivolous (Pet. App. 12a).

ARGUMENT

1. Petitioner has no basis for objecting to the government's dismissal of the federal charges against him. Rule 48(a), F.R. Crim. P., provides that the government may dismiss an indictment prior to trial by leave of court "and the prosecution shall thereupon terminate". The right of the government to enter a *nolle prosequi* at any time before impaneling the jury, without the consent of the defendant, was fully recognized at common law. *Confiscation Cases,* 7 Wall. 454, 457. The Rule modified this practice only insofar as it added the requirement that leave of court for such dismissal be given, a requirement intended to guard against harassment of a defendant by charging, dismissing, and re-charging without placing him in jeopardy. See Notes of Advisory Committee, 18 U.S.C.A. Rule 48; *Spriggs* v. *United States,* 225 F. 2d 865 (C.A. 9), certiorari denied, 350 U.S. 954; *United States* v. *Cox,* 342 F. 2d 167, 171 (C.A. 5), certiorari denied, 381 U.S. 935. As Rule 48 provides, it is only when the

government seeks dismissal "during the trial," after jeopardy has attached, that an indictment may not be dismissed without a defendant's consent. *United States* v. *Tateo,* 377 U.S. 463, 467; *United States* v. *Chase,* 372 F. 2d 453, 464 (C.A. 4), certiorari denied, 387 U.S. 907.

2. Petitioner's opposition to the dismissal of the indictment against him is, of course, not motivated by any desire to insist on federal prosecution but by a desire to preserve a belated suppression motion filed in this case. That motion, however, is not properly before this Court, for the only judicial order entered in this case was the order overruling his motion to vacate the *nolle prosequi;* no order of any type has been entered to dispose of the suppression motion (see Pet. App. 1a). Compare *DiBella* v. *United States,* 369 U.S. 121; *Carroll* v. *United States,* 354 U.S. 394 (holding that orders *granting* or *denying* motions to suppress may be appealable only when they constitute an "independent proceeding" that is "solely for return of property and is in no way tied to a criminal prosecution *in esse* * * *" (369 U.S. at 131–132)).

Moreover, the motion challenging the seizure was not filed until *after* petitioner was convicted in the state court, allegedly through the use of the evidence he claims was illegally seized. Whatever "stipulation" was made in the state court making that conviction

"subject to the ultimate determination by a federal court as to the validity of the federal warrant" (Pet. App. 10a–11a) can hardly be said to bind the United States Attorney to press a federal prosecution he believes should be discontinued. If petitioner's conviction in the Ohio court was premised on illegally seized evidence, and if he has not deliberately defaulted in raising that claim, he possesses adequate remedies, see *Mapp* v. *Ohio,* 367 U.S. 643; *Kaufman* v. *United States,* No. 53, O.T. 1968 (decided March 24, 1969), that in no way implicate the dismissal of the federal indictment against him.[1]

[1] Before this Court (Pet. 7), as in the district court (Pet. App. 6a, 11a), petitioner contends that federal agents seized his automobile and that the seizure was unlawful. Accepting *arguendo* the allegation in his motion for suppression and return that his car was "seized at the time of his arrest" (Pet. App. 6a), it is quite likely that it was forfeited to the United States long before the motion, filed twenty-two months after the arrest, was presented. Under the provisions of 49 U.S.C. 781–788 and 19 U.S.C. 1606–1609, a vehicle appraised at less than $2500 which has been used to carry contraband may be administratively forfeited to the United States if no one files a claim and bond within twenty days of the first publication of notice of seizure and intent to forfeit. See, also, 26 C.F.R. 153.4. But as we have noted above, there has been no hearing on petitioner's motion and no order denying it. The whereabouts of the auto allegedly seized from him and his right to recover it or its value thus are not properly at issue in this present attempt to secure review of the government's voluntary dismissal of the indictment.

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

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